UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist AMBRY LONG
United States Army, Appellant

ARMY 20130468

Headquarters, Fort Stewart
Tiernan P. Dolan, Military Judge
Lieutenant Colonel Francisco A. Vila, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Vincent T. Shuler, JA; Captain Brian D. Andes, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Daniel D. Derner, JA; Captain Daniel M. Goldberg, JA (on brief).

16 March 2015

SUMMARY DISPOSITION

PENLAND, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of five specifications of aggravated sexual contact with a child in violation of Article 120, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 920 (2006 & Supp. IV 2011). Contrary to his pleas, the military judge convicted appellant of four specifications of rape of a child who had not attained the age of twelve in violation of Article 120, UCMJ. The military judge sentenced appellant to a dishonorable discharge, twenty-eight years confinement, and reduction to the grade of E-1. The convening authority approved the adjudged sentence and credited appellant with 83 days against the sentence to confinement.

Appellant's case is before the court for review pursuant to Article 66, UCMJ. Appellant raises two assignments of error, both of which merit discussion and relief. We have also considered those matters personally raised by appellant pursuant to

United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), and find they are without merit.

Appellant was convicted of, *inter alia*, the following specifications:

> SPECIFICATION 1: In that [appellant], did, at or near Fort Stewart, Georgia, between on or about 1 April 2012 and on or about 30 April 2012, engage in a sexual act, to wit, penetrating with his penis the vulva of [KM], a child that had not attained the age of 12 years.
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> SPECIFICATION 3: In that [appellant], did, at or near Fort Stewart, Georgia, on or about 10 May 2012, engage in a sexual act, to wit, penetrating with his penis the vulva of [KM], a child that had not attained the age of 12 years.
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> SPECIFICATION 8: In that [appellant], did, at or near Fort Stewart, Georgia, between on or about 1 April 2012 and on or about 30 April 2012, engage in sexual contact, to wit, intentionally touching by rubbing his penis on the genitalia of [KM], a child that had not attained the age of 12 years.
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> SPECIFICATION 9: In that [appellant], did, at or near Fort Stewart, Georgia, on or about 10 May 2012, engage in sexual contact, to wit, intentionally touching by rubbing his penis on the genitalia of [KM], a child that had not attained the age of 12 years.

Appellant now argues that Specifications 1 and 8 of the Charge constitute an unreasonable multiplication of charges for findings; appellant argues the same regarding Specifications 3 and 9. He asserts that the government charged the affected specifications in the alternative and asks us to set aside and dismiss the aggravated sexual contact specifications. We agree that relief is warranted under the facts of this case.

The evidence at trial established that, while in the act of rubbing his penis on KM's vulva, appellant simultaneously penetrated her. The government's findings argument was essentially that of simultaneous rubbing and penetration:

> [T]he reasonable inference here is if an adult male is rubbing his erect penis on a 5 year old's vagina, there is going to be penetration, however slight.

The government did not specifically advise the military judge that it had charged Specifications 1 and 8 and Specifications 3 and 9 of the Charge—based on exigencies of proof—in the alternative. However, it is clear from the record that with respect to the affected specifications, the disputed issue at trial was whether appellant penetrated KM's vulva when he rubbed his penis on it. Indeed, the government may properly advance in its charging decision alternative theories of criminal liability in response to a single act. *See United States v. Jones*, 68 M.J. 465, 472-73 (C.A.A.F. 2010) ("[T]he government is always free to plead in the alternative."). In the final analysis, however, when an appellant is convicted of two specifications charged in the alternative for exigencies of proof, both convictions cannot stand. *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014) ("Dismissal of specifications charged for exigencies of proof is particularly appropriate given the nuances and complexity of Article 120, UCMJ, which make charging in the alternative an unexceptional and often prudent decision").

CONCLUSION

The findings of guilty of Specifications 8 and 9 of the Charge are set aside and those specifications are dismissed. The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident the military judge would have adjudged the same sentence absent the errors. The sentence is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored.

Senior Judge LIND and Judge KRAUSS concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court